

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of:

JIMMY P.

Claimant,

vs.

REGIONAL CENTER OF ORANGE
COUNTY,

Service Agency.

OAH Case No. 2008100612

DECISION

This matter was heard by Chris Ruiz, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, in Orange County, on December 15-18, 22-23, and 29-30, 2008, and January 2, 2009.

Claimant Jimmy P.¹ (Claimant) was represented by his father and lay advocate, Jim P. (Father) and Peter D. Collisson, Esq.

Orange County Regional Center (RCOC or Regional Center) was represented by Christina M. Doyle, Esq.

The record was left open until January 16, 2009, in order for the parties to submit closing briefs. Closing briefs were limited to 15 pages. RCOC's closing brief was received and marked for identification as exhibit RC-50. Claimant's closing brief was received and marked for identification as exhibit C261. In addition, Claimant filed a "Vendorization Appeal" which was an eight page brief, with ten exhibits attached thereto. The "Vendorization Appeal" was marked for identification as exhibit C262. RCOC objected to the "Vendorization Appeal" and contended that it was an attempt by Claimant to circumvent the closing brief 15 page limitation. RCOC's objection was marked for identification as exhibit RC-52. Claimant opposed RCOC's objection and that opposition was marked as

¹ Only Claimant's first initial of his last name is used to protect his privacy and that of his family. For that same reason, only the first initial of his family members' last name will be used.

exhibit C-263. RCOC filed a reply to Claimant's objection which was marked as exhibit RC-53. RCOC's objection was sustained and the "Vendorization Appeal" and the attached exhibits were not admitted into evidence and were not considered. Claimant's closing brief was 15 pages, the maximum page limit both parties were allowed. Claimant should have included any and all arguments in his closing brief. On January 21, 2009, RCOC also filed a "Motion to Dismiss" which was marked for identification as exhibit RC-51. That motion is denied as the below listed issues were properly submitted for decision. The record was then closed and the matter submitted for decision on January 21, 2009. By agreement of the parties, the ALJ had 30 days to render a decision.

ISSUES PRESENTED

1. Shall RCOC be ordered to fund 4 hours per week of direct 1:1 speech and language therapy (ST) for Claimant as of January 2007?
2. Shall RCOC be ordered to fund 40 hours per week of Applied Behavior Analysis (ABA) for Claimant as of January 2008?
3. Shall RCOC be ordered to fund 2 hours per week of occupational therapy (OT) for Claimant as of January 2008?
4. Shall RCOC be ordered to provide an assistive technology assessment for Claimant?
5. Shall RCOC be ordered to fund 2 aides for Claimant, 24 hours per day, 7 days per week, as of January 2007?
6. Shall RCOC be ordered to fund 2 hours per week of direct psychological services for Claimant with Dian Kearns-Tackett as of January 2007?
7. Shall RCOC be ordered to fund 2 hours per week of social recreational coaching services for Claimant?
8. Shall RCOC be ordered to permit Claimant or Father to serve as Claimant's Supported Living Services (SLS) vendor?

EVIDENCE RELIED ON

Documents: Claimant's exhibits C1-C263; Regional Center exhibits RC1-RC53 (only as to those exhibits indicated on the official exhibit list as having been admitted are in evidence.)

Testimony: Elizabeth McCurdy, Nelly Ninh, Luis Pena, Sean Watson, Keli Radford, Janis White, Suzanne Lowe, Sandra Soto, Mary Kavli, Father, Dr. David Paltin, and Dian Kearns-Tackett.

FACTUAL FINDINGS

Jurisdiction and Case History

1. On October 17, 2008, Claimant filed a Fair Hearing Request (FHR).
2. On November 24, 2008, at a pre-hearing conference, the 20 issues offered by Claimant were reduced to the eight issues listed above for all the reasons fully set forth on the record.
3. On December 5, 2008, the parties filed a Joint Statement of Issues.

Background Information

4. Claimant is a 21-year-old male and a consumer of RCOC by virtue of his diagnosis of autism. At times, he is aggressive and demonstrates fleeing behavior. Claimant has always resided with Father. Father presently provides a wide variety of services which enable Claimant to have a full life. RCOC currently provides the following services: Parent-Vendor respite (PVR) at 24 hours per month and Personal Assistance (PA) at 30 hours per week. Claimant also receives 282 hours per month of personal care services and protective supervision through In-Home Supportive Services (IHSS), which is funded by Orange County.
5. The relationship between the parties is strained. Father has refused all services and suggestions offered by RCOC. On the other hand, RCOC initially rejected all of Claimant's requests related to this case, only to modify their position(s) as the instant fair hearing grew near.

Shall RCOC be ordered to fund 4 hours per week of direct 1:1 speech and language therapy (ST) for Claimant as of January 2007?

Shall RCOC be ordered to fund 2 hours per week of occupational therapy (OT) for Claimant as of January 2008?

Shall RCOC be ordered to provide an assistive technology assessment for Claimant?

6. Claimant is eligible to receive special education instruction and services from the Irvine Unified School District (school district), because he is younger than age 22, was enrolled in a special education program prior to his 19th birthday, and Claimant has not yet earned a high school diploma. Claimant has not attended school for several years. Father is a zealous lay advocate for students with special education

needs. Father has been involved in contentious legal battles with numerous school districts. Claimant contended that RCOC should seek services from the school district on behalf of Claimant, and that Claimant need not seek services from the school district before requesting that RCOC fund those services. RCOC offered to assist Father in seeking services from the school district, but Father declined. RCOC is unable, without Father's cooperation, to seek services for Claimant from the school district. Despite Father's occupation, Claimant did not establish that his present school district would not fund ST, OT, or an assistive technology assessment for Claimant. Additionally, Father's insurance is potentially available to pay for these services. Claimant did not establish that he has attempted to obtain funding for ST, OT, or an assistive technology assessment through his Father's insurance company.

7. Whether or not Claimant requires these services is not determined by this decision. Assuming *arguendo* that Claimant requires these services, Claimant did not establish that RCOC is mandated to pay for said services.

Shall RCOC be ordered to fund 40 hours per week of Applied Behavior Analysis (ABA) for Claimant as of January 2008?

8. In March of 2006, Autism Behavior Consultants (ABC) prepared a Functional Analysis Assessment (FAA). ABC recommended a 50 to 80 hour Applied Behavior Analysis (ABA) consultative program, which RCOC funded. ABC did not recommend a 1:1 ABA program at that time. When ABC terminated services, RCOC offered to have another vendor evaluate Claimant for ABA services. Father declined RCOC's offer because, in Father's opinion, Claimant had been recently evaluated by ABC.
9. Claimant relies on ABC's report for his argument that in March of 2006 RCOC was on notice that Claimant required two caregivers. However, the relevant portion of the report stated:

Parents should explore available vocational programming and other community support programs that would be available to Jimmy. *To participate in such programs*, Jimmy will require 1 to 2 behavioral support personnel. (*emphasis added.*)

The report states "1 to 2" personnel are needed, not "2." Second, the personnel are required so that Claimant could "participate in vocational programming and other community support programs." RCOC offered a number of vocational training programs to Father, all of which were declined.

10. Dr. David Paltin, a licensed psychologist, testified at hearing. He stated that Claimant requires a 40 hour, 1:1 ABA program. However, his report is dated December 1, 2008, which is six weeks after Claimant filed his fair hearing request and only 14

days before the instant administrative hearing began. Dr. Paltin's report was provided to RCOC approximately at the time the administrative hearing began. In general, fair hearings are not designed to take the place of Individual Program Plan (IPP) meetings where professionals, Claimant, and Claimant's family can determine Claimant's needs and desires. Claimant did not establish that RCOC has had an opportunity to evaluate Claimant's request for ABA therapy via the IPP process.

Shall RCOC be ordered to fund 2 aides for Claimant, 24 hours per day, 7 days per week, as of January 2007?

11. RCOC has offered to fund two aides, 24 hours per day, seven days a week, through an RCOC vendor, with the goal of transitioning Claimant to Supported Living Services (SLS). In September 2008, RCOC agreed to fund this service through "No Ordinary Moments" (NOM). When Claimant declined to accept this offer based on a prior bad experience with that vendor, RCOC offered a number of alternative vendors, all of whom were rejected by Father. Claimant did not establish that RCOC's offer was unreasonable. RCOC did not place any time restriction on when, and if, Claimant would be ready to be transferred to SLS and offered to fund 2 aides until that time. As a transfer SLS may take an extended period of time, and OCRC did not limit the time during which it would fund two aides, its offer was reasonable. Father also apparently took issue with RCOC's proposal to reduce Claimant's PVR and PA hours if it were to fund 24-hour per day care. This proposed reduction was also reasonable because it would not make sense to provide two aides, seven days a week, 24 hours a day, with additional respite hours. This is because Father could take a break at any time since he would have 24 hour care for Claimant. Claimant did establish that OCRC should be ordered to continue to maintain their previous offer and that NOM should no longer be considered as a potential vendor.
12. It was not established that Claimant needed this service as of January 2007, or prior to RCOC's offer, for the reasoning set forth in Finding 9 and 11.

Shall RCOC be ordered to fund 2 hours per week of direct psychological services for Claimant with Dian Kearns-Tackett as of January 2007?

13. Dian Kearns-Tackett has worked in the field of autism for almost 20 years and she is the executive director of a non-public agency that assists people with autism. However, she is not presently licensed as a psychologist. Only a licensed psychologist should provide psychological services for Claimant. As framed, the issue presented specifically sought funding for psychological services with Ms. Kearns-Tackett. As such, Claimant did not establish that RCOC should be required to fund this service if it were to be provided by Ms. Kearns-Tackett. Additionally, it was established that Father's insurance, or Claimant's school district, could potentially fund this service. Claimant offered no evidence that Father's insurance or the school district has refused to pay for this service. As such, it was established that these generic resources could potentially pay for the desired service.

Shall RCOC be ordered to fund 2 hours per week of social recreational coach services for Claimant?

14. The evidence established that Claimant is very athletic and is able to run, roller-skate, swim, and complete simple football plays. As such, the evidence did not establish that Claimant has a social-recreational need that is not being met or that a recreational coach is required to remedy a deficit. In fact, Claimant desires a coach so that he can, in part, train for a marathon. Claimant can already run a half-marathon. Claimant's athletic ability established that he does not require a social recreational coach.

Shall RCOC be ordered to permit Claimant or Mr. P. to serve as Claimant's Supported Living Services (SLS) vendor?

15. Father is a terrific parent who has fought for what he believes is best for his son throughout his son's life. Father has also provided Claimant with a loving home and many activities that have enhanced his son's life. However, Claimant did not establish that this issue should be decided by the ALJ. First, Claimant and Father have not yet applied to be Claimant's SLS vendor. While there was initially some confusion as to whether Father could serve as Claimant's SLS vendor, RCOC recently agreed to allow Father to apply. To date, Father has not done so. Second, if RCOC denies Father's future request, Father may first appeal to the director of the RCOC and then to the director of the Department of Developmental Services (DDS). (Cal. Code of Regs., tit. 17, §§ 54380 and 54384.) Thus, Claimant did not establish that OAH has jurisdiction to order Claimant or Father to be Claimant's SLS vendor.

LEGAL CONCLUSIONS

Jurisdiction & Burden of Proof

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. and Inst. Code, § 4500 et seq.)² An administrative "fair hearing" to determine the rights and obligations of the parties is available under the Lanterman Act to appeal a regional center decision or act, including discrimination or acts not in the consumer's best interest. (Code, § 4710.5) Claimant properly and timely requested a fair hearing and therefore jurisdiction for this appeal was established. (Factual Findings 1-3.)

2. Where an applicant seeks to establish eligibility for government benefits or services, the burden of proof is on him. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits); *Greator v. Board of Admin.* (1979) 91 Cal.App.3d 54, 57 (retirement benefits).) The standard of proof in this case requires proof to

² All further statutory references are to the Welfare and Institutions Code unless otherwise stated.

a preponderance of the evidence, pursuant to Evidence Code section 115, because no other law or statute (including the Lanterman Act) requires otherwise.

3. Code section 4646.5, subsection (a), states:

The planning process for the individual program plan described in section 4646 shall include all of the following: (1) Gathering information and conducting assessments to determine the life goals, capabilities and strengths, preferences, barriers, and concerns or problems of the person with developmental disabilities. For children with developmental disabilities, this process should include a review of the strengths, preferences, and needs of the child and the family unit as a whole. Assessments shall be conducted by qualified individuals and performed in natural environments whenever possible. Information shall be taken from the consumer, his or her parents and other family members, his or her friends, advocates, providers of services and supports, and other agencies. The assessment process shall reflect awareness of, and sensitivity to, the lifestyle and cultural background of the consumer and the family.

In order to determine how an individual client is to be served, regional centers are directed to conduct a planning process that results in an IPP designed to promote as normal a life as possible. (Code, § 4646; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 389.) The IPP is developed by an interdisciplinary team and must include participation by the client and/or his or her representative. Among other things, the IPP must set forth goals and objectives for the client, contain provisions for the acquisition of services (which must be based upon the client's developmental needs), contain a statement of time-limited objectives for improving the client's situation, and reflect the client's particular desires and preferences (Code, §§ 4646, subd. (a)(1, 2, and 4), 4646.5, subd. (a), 4512, subd. (b), and 4648, subd. (a)(6)(E)). A regional center must then "secure services and supports that meet the needs of the consumer" within the context of the IPP (Code, § 4648, subd. (a)(1)). For the reasons stated in Factual Findings 8-10, it was not established that Claimant's request for ABA services has been properly evaluated through the IPP process. Further, it was not established that Claimant has an unmet need for a social recreational services that has not been met through the IPP process. (Factual Finding 14.)

4. Code section 4640.7 states:

(a) It is the intent of the Legislature that regional centers assist persons with developmental disabilities and their families in securing those services and supports which maximize opportunities and choices for living, working, learning, and recreating in the community.

(b) Each regional center design shall reflect the maximum cost-effectiveness

possible and shall be based on a service coordination model, in which each consumer shall have a designated service coordinator who is responsible for providing or ensuring that needed services and supports are available to the consumer. Regional centers shall examine the differing levels of coordination services needed by consumers and families in order to establish varying caseload ratios within the regional center which will best meet those needs of their consumers.

5. Code section 4640.6, subsection (d), states:

For purposes of this section, "service coordinator" means a regional center employee whose *primary responsibility includes* preparing, implementing, and monitoring consumers' individual program plans, *securing and coordinating consumer services and supports*, and providing placement and monitoring activities." (Emphasis added.)

6. While the service coordinator is primarily responsible, the service coordinator is not solely responsible for locating needed supports and services for Claimant. That is, Father also shares in this responsibility. To find otherwise would mean that Father could do nothing and demand that RCOC coordinate every aspect of Claimant's services. Such is not the intent of Lanterman Act, which implies a level of cooperation between the regional center and the parents/guardian of a consumer. (Factual Findings 5-15.)

7. Although regional centers are mandated to provide a wide range of services to facilitate implementation of the IPP, they must do so in a cost-effective manner (§ 4640.7, subd. (b), § section 4646, subd. (a)). A regional center is not required to provide all of the services which a client may require, but is required to "find innovative and economical methods of achieving the objectives" of the IPP (§ 4651). They are specifically directed not to fund duplicate services that are available through another publicly funded agency. This directive is often referred to as "supplanting generic resources." Where a service is available elsewhere, the regional center is required to "identify and pursue all possible sources of funding. . . ." (Code, § 4659, subd. (a)). However, if a service specified in a client's IPP is not provided by a generic agency, the regional center must fill the gap (i.e., fund the service) in order to meet the goals set forth in the IPP (§ 4648, subd. (a)(1); *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 390). In general, Claimant must first attempt to utilize all available generic resources, like Claimant's school district or Father's insurance, before seeking services from the regional center. Father did not meet his burden of showing that generic resources are unavailable to fund ST, OT, and assistive technology assessment, or psychological services. Until such time as Claimant has exhausted the available generic resources, or that said resources can not fund these desired services, RCOC need not fund said services. (Factual Findings 5-15.)

8. No legal authority was cited by Father indicating that the ALJ has jurisdiction to order Claimant or Father to serve as Claimant's SLS vendor. (Factual Finding 15.)

ORDER

Claimant Jimmy P's appeal of Regional Center of Orange County's denial of services is denied in part and granted in part. The appeal is denied in whole except for the following orders:

1. RCOC shall fund 2 aides per day, on a 7-day, 24 hours per day basis, with a vendor other than No Ordinary Moments, until such time as Claimant is ready to be transitioned into a supported living environment. Father shall cooperate in the selection of an RCOC vendor for this service.

2. Within 30 days of the date of this decision, RCOC shall schedule an IPP meeting to discuss whether Claimant requires ABA services.

DATED: February 9, 2009,

_____/s/_____
CHRIS RUIZ
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision pursuant to Welfare and Institutions Code section 4712.5, subdivision (b)(2). Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.